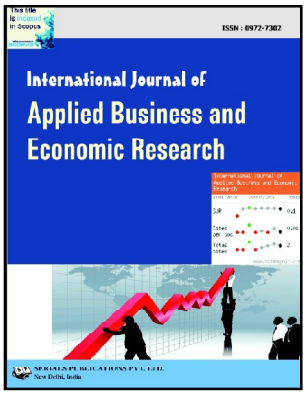

International Journal of Applied Business and Economic Research

ISSN : 0972-7302

available at http: www.serialsjournals.com

Volume 15 • Number 19 (Part-II) • 2017

Justifications for Recognition of Open Price Term in Islamic Law

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Abstract: Contrary to traditional rules for determination of price at the time of formation of the contract, the concept of open price term allows parties to form a valid sale contract although the price is not specified. This is to protect parties from contractual risks in modern trade. Open price sale contracts are now widely used throughout the world at different levels; governmental, business to business, business to consumer and in many cases in deals made by non-business individuals. In such circumstances, when open price term is the widely used alternative to the rule of fixed price, there are some laws that do not seem to accept this method of contracting. Based on certain principles, Islamic rules require parties to fix the price at the time of formation of the contract. Thus the concept of open price term is rejected by the Islamic rules. As such, countries whose rules are based on Islamic law cannot have open price to cater to the needs of contemporary trade methods. Thus, through a doctrinal research method, this study aims to justify the possibility of accepting open price term as a key element in today's world trade, in accordance with the Islamic law.

Key words: Sale contract, Open price term, Islamic law, Islamic principle of La Ḍararwa La Ḍirar, Islamic principle of Nahā Al-Nabī ᶜ Anil bāiᶜ Al-Qarar, Islamic principle of Maṣliḥah.

1. INTRODUCTION

The necessity attached to specification of considerations in a sale contract has traditionally been an unavoidable one. The situation is similar in legal system of most countries. Zulueta (1945) explains, in the Roman legal system, a contract is valid only if the exact price was determined or certain methods for its determination existed in the contract. Therefore, according to the traditional rules of many countries, if price was determined through variable factors in the future, or it was devolved to a third party to fix, the contract would be regarded as void. Darabpour(1997) points out that in the old European legal system the specification of price was an essential condition of a transaction, without which the agreement was null and void. However, in most modern laws, that position has changed, and the mandatory specification of price has now been replaced by the concept of 'open price.'

Based on the reasoning by Islamic scholars, in order to form a valid and legal sale contract, price should be specified prior or at the time of concluding a contract and not after it. The philosophy behind the rejection of an open price term in the Islamic law is the principle of prohibition of a harmful sale contract (**نهي النبي عن البيع الغرر**) and prohibition of any loss and any causes of loss in Islam (**لا ضرر و لا ضرار في الاسلام**). This study aims to consider the concept of open price term and attempts to justify the legitimacy and possibility of acceptance of this vital concept in today's world trade based on the same above-mentioned Islamic principles. This will clarify that acceptance of open price term is in line with the goals of such principles and not against them. Moreover, in this study, the legitimacy of open price term will be proven based on some other Islamic principles as well.

2. THE INFLUENCE OF ISLAMIC LAW ON PRICE RULES

Any rule passed by the way of religious orders or government statutes has logic in it. Based on the Islamic law, a sale contract that contains an open price term is not valid. Thus what is the logic of this prohibition? There are many maxims in the Islamic law that form the argument of this rule. Some of them are derived from the words of the Prophet (PUH), which are called *ḥadith*. A very famous *ḥadith* is a statement of the Prophet (PUH) that provides for the 'prohibition of a harmful sale contract'. A sale contract that contains any conditions or specifications that may cause loss to any of the parties is prohibited and considered void. As can be understood from the above phrase in the *ḥadith*, the main concern of the maxim is the issue of harm. There is also another Islamic principle which states that there is no loss or causes of loss in Islam. In other words, the maxim stresses that do not harm yourself or others. This principle is the basis for of many Islamic rules (Taherkhani, 2003).

The explanation of why this principle relates to the matter of open price is the belief that if the parties do not know exactly what they will transfer and own through the contract, they will face loss and it is therefore risky for them. This also indicates that this ignorance would be the main cause of any likely loss. If the seller does not know how much he will receive from the transaction, and, if the buyer does not know how much he will pay as the consideration, there would be a perfect basis for any kind of loss (Taherkhani, 2003). The same reason exists behind the traditional rules of other countries with non-Islamic legal system. Under these laws, the philosophy behind rejection of an open price term is the matter of 'certainty' and 'uncertainty.' On this issue, Prosser (1932) states:

> …the principal legal obstacle to an open price contract is the requirement of certainty. The price is an essential term of the contract; without it, there is no sufficient consideration for the seller's promise and no measure of thebuyer's obligation to perform.

However, supporting the idea of open price term is Prosser (1932) whobelieves that "opposed to this requirement of certainty is the obvious fact that in all open price contracts there is an intention to make a deal. The agreement is made by businessmen; it is meant to accomplish something." It is not possible to assume that parties have agreed to make a contract with the intention that it shall have no effect. It is also hard to presume that the parties may have intended anything unreasonable. The fact that the parties have decided to make the contract, although it has not been possible to fix the price at the time, signifies the importance of the formation of the contract to the parties and how eager they are to contract it. He adds that when there is an open price term in the contract, there is a reasonable, ascertainable objective standard

namely, the current market price of the goods at the time and place of the performance named in the contract.

Alidoost (2004) explains one of the important principles used for the deduction of rules relating to transactions is the fact that any harmful sale contract is prohibited in Islam. Most of the Shi'ah and Sunni religious jurists observe this rule in specific situations, such as when the matter concerns the possibility of the delivery of goods to the buyer. This means that if it is impossible for the seller to deliver the goods to the buyer, and if the buyer himself is also unable to collect the goods, the sale contract is void as this is damaging to the buyer. The next case in which the above principle is used to prohibit and invalidate a sale contract is the issue of knowledge of the parties as to the quality and quantity of the consideration. Without such knowledge, the parties do not know the qualifications (the amount of the price for instance) of the consideration and this is considered harmful to all parties or at least, to one of them. The third case is the knowledge of different conditions such as the time of delivery and so forth. The Iranian Constitution declares that:

> All laws and regulations including penal, financial, economic, administrative, cultural, military, and political rules must be based onIslamic criteria. This is the principle that shall absolutely and generally govern all the constitutional rules as well as all other laws and regulations, and this shall be at the discretion of the jurists (Islam scholars), i.e. members of the Guardian Council (Article 4, Iranian Constitution).

Jafarzadeh (2004) states that under the Iranian law, "the Constitution has also extended the significance of Shi'ah laws to the level of dispute resolution by the courts." The Iranian Constitution provide that, "the judge is bound to endeavour to judge each case on the basis of the codified law; in the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic Fatawa [discretion of the judges]" (Article 167, Iranian Constitution).

What then are the views of Islamic scholars? The majority of early scholars in Islamic jurisprudence believe in the necessity of determining the price at the time of contracting. This rule is observed so tenaciously that if the price is not fixed, the sale contract will be void (Noori, 2004). Below are the views of some Islamic law scholars.

MuḥaqeqḤillī(1993) believes that it is compulsory in a sale contract that the price should be fixed at the time of making the contract. If the determination of the price is devolved to one of the parties (seller or buyer) then the contract will not be concluded (will be void) based on the *ḥadith* on prohibition of harmful sale contracts and prohibition of any loss. Najafī (Undated) elaborates the above opinion by asserting that if the determination of the price is devolved to one party or a third party or a norm and a custom, the contract is therefore not valid. He adds that, based on his research, there is no dissidence among religious experts on this point, except for Īskafī. Īskafī in his dissenting view argues that the contract is considered valid if the goods are determined and specified and one of the parties does not know about the price, then the sale is valid. Najafi also points out that, in addition to existing consensus, the opposing view is, in fact, contrary to the Apostle's statement about prohibition of any loss and damage.

Saiḥ Murtaḍa Anṣari (1997) equally shares the idea that price should be specified at the time of the formation of contract. He adds that the determination of price should not be devolved to one of the parties; otherwise, no contract will be formed (Jafarzadeh, 2004). Saiḥ Anṣari rejects Īskafi's suggestion by giving an example in which a seller says that he sells the goods at the same price that he has just sold to

other buyers (Shikh ʿli ibn al-ḤossainKaraki, 1991). In Saiḥ Anṣari's view, even this method of specifying price is not accepted.

The above discussion relates to the ideas of Shi'ah experts. However, they are almost similar to those of the Sunni experts. The Ḥanafī School states that, one of the requirements for the formation of a sale contract is a definite consideration. Therefore, it is not possible to sell a commodity with an unspecified price. The Maliki, Shafi'ī, and Ḥanbalī Schools (Sunnis) also share the same belief; the main reason for which is the aforementioned maxim on the 'prohibition of a harmful sale contract' (Jafarzadeh, 2004).

3. WHAT IS AN 'OPEN PRICE'?

Prosser (1932) notes that the most important function of an open price term in a sale contract is to shift the risk caused by a fluctuating market from one party to the other. A seller who is the owner of a thousand bushels of wheat is always concerned about fluctuation of the market price of wheat, and that the price may decline in the future making him receive much less than what his wheat is worth at the present moment. On the other hand, a buyer who needs a thousand bushels of wheat is always worried about the possibility that before he buys the market price will increase and he will have to pay more than what he may presently have to pay. When they agree upon the sale of the wheat at a specified price (for example, the price of one dollar per bushel), these risks are exchanged. To Prosser (1932), "It is now the seller who assumes the risk that the market will increase and that he will have lost a profit; the buyer who assumes the risk that the market will go down and the bargain prove to be a bad one." The situation is similar to this when the contract is for future delivery, with the exception that, in this case, the seller will face more risks if he wants to deliver the wheat for one dollar while the value of the wheat will probably increase at the time of delivery. The buyer may also regret his deal if, at the time of delivery, the market price has fallen to fifty cents. However, most of the time, the parties of a sale contract are unwilling to agree to this particular exchange of risks. They may wish to enter into a safe contract with the least contractual risks. The seller may want to avoid any risk and at the same time be assured of a market for his products, either immediately or in the future. The buyer may also want to be sure of the supply of goods while there is always a possibility of decline in price. In cases where the delivery is supposed to be performed at a future date, the parties may be uncertain about what the future price of the goods will be. In view of these conditions, there are attempts to deal with the transfer of risks, in a changing and fluctuating market, between the parties. Ultimately, this "has led to a variety of business arrangements by which, in a sale contract, the price is left open for future determination" (Prosser, 1932).

Edwards (1992) explains the different ways of price determination that are practiced throughout the world. He points out that parties who are concerned with price fluctuation by the time the goods are delivered can even agree to fix the price not based on the contracting day's market price, but based on what they estimate the price will be at the time of delivery of the goods. In this way, although the actual price of the goods by the time of delivery might be more or less than what they have assumed, the difference in price can be compensated through nonpayment to insurance institutions in order to deal with price fluctuations. In other words, in case that the price of the goods at the time of concldng the contract is $1 and the parties are worried about the contractual risks that may arise from price fluctuation, they will still benefit by leaving the price open. This is because if the price at the time of delivery is $0.99 or $1.1, the parties do not lose anything as in the normal method in which they fix the price at the first stage, they

would have to pay the same amount of 0.1$ to the insurance institutes in order to avoid the price fluctuation risks.

To Murray (1984), in practice and as a result of new trade methods around the world, considerable amount of sale contracts are made in open price form. It is costly to present goods at the marketplace as there are costs of production and transportation involved. The amount of these costs, which are almost uncertain, will cause the market price of goods to increase or decrease. Thus, the final price of goods is usually uncertain. As Vold(1956-1957) explains, even the possible number of buyers is not certain, especially according to the time and different situations. There are many other features that make the market price of goods uncertain. He continues by stating that "Boom, bust, war, peace, hope, fear, crisis, growth, decay, change; these may also affect general market fluctuations… a given fixed price thus may at the time of contracting seem too risky."

Prosser (1932) points out that sale contracts with open price terms "are most commonly made when the market is fluctuating violently and future prices are most uncertain". Parties of a contract intend to conclude their sale contract with open price term in order to avoid some risks. The contractors are business people and they do so in order to benefit from the contract as much as possible. Therefore, open price is a key element that provides the potential of performing less-risk transactions.

Hojati (2006), mentions that in the past, there were not many giant companies with a high level of commercial affairs at national and international levels. Thus, the above mentioned problems were not accutely felt as it is in present circumstances. Today, trading conditions have changed. The possibility of including the open price term in contracts between factory and buyers of the products is beneficial for both parties. The factory can be certain of the number of customers and collect the deposit given by them as a financial source and support the production of the goods. The consumers will have the advantage of having the products when they are produced at a price which is less than the market price of the day. This is the facility normally provided by factories to such customers. Manufacturing companies that have fewer shareholders need these contracts in order to ensure a critical mass of purchasers and bear the expenses of production. Industrial and manufacturing companies are obviously the pillars of a country's economy and their bankruptcy and closure can cause serious damage to the economic body of the society.

Aside from what the open price term means economically, this phrase means is described through legislations. A combination of open price rules United States, United Kingdom and the CISG as the international rule for sale of goods shows that a sale contract contains an open price term if nothing is said as to price; or the price is left to be agreed by the parties and they fail to agree; or the price is to be fixed in terms of some agreed markets or other standardsas set or recorded by a third person or agency and it is not so set or recorded (FarzanehAkrami*et al*, 2014). However, as the rules are different in Iranian laws, the attitude of Iranian laws and lawyers will be reviewed below.

4. JUSTIFICATION FOR VALIDITY OF OPEN PRICE SALE CONTRACT WITH RESPECT TO ISLAMIC PRINCIPLES

In the holy book, Quran, God says: "God has permitted sale and has forbade usury" (Al-Quran, Baqarah 2:275). Sadigh Ibn ʿAbd Al-Raḥmān Al-qaryanī (2013) states that, it is a known principle in sales and contracts among Islamic scholars that the is that they are legal and permissible except when there is a

rational reason for rejecting them. He mentions a *ḥadith* where the Prophet (PBUH) states that: "Whatever God has permitted in his book is justified and acceptable and whatever God has forbidden in his book is prohibited, and whatever God is quite about, God has allowed them and has excused people for them (**فهو ممّا عفى عنه الحلال ما أحلّ اللّه فى كتابه و الحرام ما حرّم اللّه فى كتابه و ما سكت عنه**)." The most important reason for the rejection of open price term by Iranian law is the prohibition of loss to the parties which is obtained from the Islamic principles that cause the idea of necessity of determination of the price by the time of formation of the contract. Thus, it is appropriate to refer to Islamic literature and principles in order to justify the necessity for an open price term in today's circumstances.

One of the most important aims of Islamic rules is to oppose any based for loss of people's wealth, health and other aspects of their life. This is the reason for the Islamic tenet that, as Motahari (1994) states, it is on Muslims to match the Islamic provisions (more specifically, rules for transactions) with the day's circumstances and needs. He explains that the required rules for each era may differ in some provisions in order to protect people from consequences of changes in all aspects of life. They aspire for a better quality of life and continuously fashion new devices to respond to their economic, social and spiritual needs. The invention of new techniques leads to the replacement of old ones and as a result, new needs emerge. This, in turn, will compel people to make some adjustments. Thus, such evolutions always create the need for change in order to cope with current necessities.

Khoeii (2002) oobserves that there may be some rules that are characterized for a certain era and period of time. He points out that sometimes an act would be harmful based on the circumstances and it should be prohibited by the Islamic rules and principles. However, sometimes the same issue becomes a necessity for the society and so the prohibition should be removed based on the changes that have happened throughout the time of such circumstances. Thus, it is the responsibility of the legislator to consider which rule that has the best effect on people and the society so that the *maqasid* of Islamic rules are preserved.

There are different texts written on the bilateral relation between law and rules and financial development (Thorsten and Ross Levine, 2003; Thorsten *et al,* 2004). According to Habib Ahmed (2006), "one of the most important determinants of financial development is the adaptability of law to changing conditions." This elaborates the possibility of improvements in traditional rules into more effective and helpful rules. This is more visible in legal systems, which, because of their quest for sound financial systems and economic development, have significant contracting needs. However, while most studies on the effect of legal systems on financial development relate to civil and common law regimes, no attempt has been made to discuss the effect of Islamic law on financial development. It is believed (Pistor *et al.*, 2002; Bailey *et al.*, 1994) that an effective factor that determines the development of financial system is the adaptability of laws. In fact, changes in socio-economic situations require the adaptability of laws and an appropriate process of law-making in order to allow a country to develop (Beck, 2004). Laws that are not ready to cope with changes cannot fill the gaps in financial requirements of the economy, and this will be an obstacle to finance and financial development.

The noticeable specifications of Islamic rules is the possibility of translating them into modern language without breaching any of its fundamental rules and principles (Motahari, 2002).As Syed Hashim Ali Akhter [online] quotes Maulana Waheeduddin Khan, President of the Markaz e Islami, New Delhi:

> The intellectual development of the present day Muslims has practically stopped. The reason is that they have become used to following blindly whatever scholars have written in the past […] The main reason of the failure of Muslims is that while they think about what is right and what is wrong, they fail to see what is possible [….] They fail to follow the gradual process adopted by the Prophet, of changing the minds before changing the system. *ijtehad* is not merely an intellectual process.

As to a sale contract without a specified price, Imam Ibn Taimiyyah (1993) explains that if the price is not determined, the price would be the price of the same subject in the market.

Traditionally, there are two general divisions in Islamic rules namely, rules relating to devotional tasks (*ᶜibadat*) and rules relationg to transactions (*muᶜamalat*) (Kamali, 2000). There are certain differences in the characteristics and nature of these two kinds of rules. Based on devotional orders, once an act is not permitted by Shariᶜah, it is thereby entirely prohibited (Akrami *et al*, 2015). The incumbency of performing ablution prior to offering prayers is of this kind of orders. However, transactional rules such as rules for selling and buying are possible to be interpreted based on the needs of each era as they are to provide welfare and prevent harm and loss. In this category, everything is permitted other than those explicitly forbidden. This is called the principle of permissibility (*ibaḥah*) (Khoeii, 2002). Shariᶜah has provided certain transactional rules during the time of the Prophet PBUH to protect the rights and interests of the transacting parties as much as possible and based on the circumstances of the time. However, the science of *fiqh* was then established to maintain this task of the transactional rules based on changes in human life. In other words, the need to have practicable rules in trade transactions has created the concept and science of *fiqh-al- muᶜamalat* (jurisprudence of transactions). In regards to this category, *qarar* (loss) is one of the prohibited items. Meanwhile, there could be the possibility of *qarar* for people in case that to follow some outdated rules is insisted. In fact, As Kamali (2000) explains, ruling on *muᶜamalat* [transactions and deals] can be moderated and adjusted through the process of *ijtihad*.

As Habib Ahmid (2006) points out, Islamic law aims certain factors in the life of people. To preserve and promote *maṣaliḥ* (public interest; public welfare; utility) of mankind is of these factors. Each Islamic rule shall act in line with the goal of protection of religion, life, reason, progeny and property of people. Kamali (2000) also mentions in order to provide modified rules certain concepts and principles should be respected. Rationales (*ḥikmah*) and causes (*ᶜillah*) of the original principles and rules together with benefits, interests and welfare (*maṣliḥah*) of humankind should all be considered. Once goals (*maqacid*) of Shariœ"ahare respected in framing up-to-date rules, the new rules will be justified. At the same time, it is vital to consider necessities and needs of the modern era that causes a flow of necessity for amendments in all legal aspects.

As ᶜAbdullah Jalil (2006) explains, it is necessary to refer to the important and determining concepts and principles of *maṣliḥah* and doctrine of *maqaṣid* (objectives)if the aim is to develop Islamic provisions on transactions. Within the Islamic framework, these two concepts have an important effect on matters such as project evaluation procedures. According to Al-Ghazali (1998), *macli%ah*is the best standard and criterion for evaluation of proposals for up to dating Islamic rules. He believs that *maṣliḥah* is the "preservation of the religion, life, mind, offspring and wealth." It shows that traditional rules based on new circumstances in commercial relations acting against these factors are harmful and rejected by Islamic rules. He further states that "everything that leads to the preservation of these five foundations is considered *maṣliḥah*, and everything that leads to the disruption of these foundations is *mafsadah*, and its removal is *maṣliḥah*."

It should be noted that *mafsadah* (loss; harm; corruptive; disadvantage; disruption; damage from the shariœ"ah perspective), the opposite concept of *maṣliḥah*, includes financial loss. Hence, it is a generally held view that the Shariᶜah, in all its parts, aims at securing a benefit for the people or protecting them from any loss. As a principle, from the Shariᶜah point of view, any act that is in favour of the welfare of the people is considered to be utility or *macli%ah*. On the other hand, anything that undermines the welfare and interests of the people is considered to be disutility or *mafsadah* (Ḥabib Aḥmed, 2006).

Siddiqi (2004) believes that in present times, the reality of the goals (*maqaṣid*) of Shariᶜah has not received sufficient attention in order to support the interests and benefits of the people that can be met through new rules in the contemporary world. As he points out, "sustenance for all, dignity, security, justice and equity, freedom of choice, moderation and balance, peace and progress, reduction in inequality in the distribution of income and wealth" are very important aspects of human life that require adequate rules. Khan and Feddad (2007) believe that the modification of Shariᶜah principles in order to cope with and respond to the new circumstances and changes that have created new needs, will help the Islamic and conventional financial institutions meet at one common point. In other words, it will help create an interface between both of them. In this way, the traditional Islamic rules will not act as a constraint to the global growth of the Islamic financial institutions. Hence, will positively affect the growth of the Islamic finance industry.

As mentioned earlier, there are many contemporary issues that have no anchor in the past and traditional rules. An example could be open price sale contract which is known as a rejected and invalid contract as there are bases for *qarar* and *ḍarar* of the parties due to lack of knowledge on the exact amount of the price. In this regard, a noticeable change and evolution in traditional believes of scholars has happened. Kamali (2008) argues that, if new trade methods and the existing technology can provide a safe transactional environment for the parties, then *qarar* is widely eliminated.

Following the above explanations, to clarify the *maqaṣid al sharī'ah* in prohibiting open price, the issues of prohibition of any causes of loss should be considered in line with the concepts of *maqacid* and *macliṣah*. The Quranic verse which states the importance of Prophethood of Prophet Mohammad (PBUH) : "We have not sent you but as a mercy to the worlds" (Al-Qurʿan, Al-Anbiā 21:107) is an expression of what the *maqacid al sharī'ah* is. In addition, this can also be seen in the part of the Quran expresses its characterization by stating that it is "a healing to the (spiritual) ailment of the hearts, guidance and mercy for the believers (and mankind)" (Al-Quran, Yunus 10:57). In fact, as Kamali (2008) mentioned, the Quran and Sunnah seek to establish justice and alleviate hardship. Thus, as *maqacid al shariœ"ah*is to remove *mafsadah* and to impose *maṣliḥah*, and as *maṣliḥah* is described to protect the wealth of the humankind, then to accept the new concept of open price term would be a necessity in order to impose the considered *maqacid* and *maṣaliḥ* in the Islamic law. An open price term, as it is explained earlier is to reduce the contractual risk of all parties and to provide more certain grounds for a beneficial contract that altogether provide the *maṣaliḥ* to the society and people. On the other hand, the negative effects of lack of an open price term in Iran will result in *mafsadah* caused by such negligence in revision of the rules. As such, in order to exercise the *maqasidal Sharī'ah*, accepting the open price term is vital.

Traditionally, the concept and necessity of certainty were preserved and respected through the necessity of determination of the exact amount of the price in order to ascertain the protection of benefits of all parties of a contract. However, as Beatson (1998) states, in some transactions, the parties may be neither

able nor desire to determine and specify all matters. A contract that leaves some essential factors of the bargain undetermined may contain some methods of determination. As such, the concept of certainty would be the fact that the parties understand all parts of their contract and they intend to form the contract even though the price in a sale contract is left open by the mutual consent of the parties. Thus, if the parties know that they will benefit more from their contract and can avoid contractual risks as much as possible, then to force them to specify the price that would normally be the market price of the time of formation of the contract would be harmful to them and is contrary to *maqaṣid al Sharĭah*.

Reysuni (1997) also maintains that one of the necessary goals of Shariᶜah is to protect wealth and property of people in two ways; to keep people's legitimate property as well as help prove its existence, and to protect people's wealth such as money and property from loss and damage. He notes that one of the conditions that Shariᶜah has imposed for a sale contract is that there should be no loss to the contracting parties. He, however, pointed out that in some sale contracts it is impossible or difficult to enforce this condition. The question in such a case, therefore, is whether the contract should be regarded as null and void or it is better to recognize it while trying to reduce the risk and potential loss as much as possible? His answer to this question is that there is no doubt that the second solution is a demonstration of righteousness. This idea makes the justification of an open price term much easier to appreciate. In fact, if such a contract described by Reysuni is lawful then a sale contract in which the parties have left the price open in order to avoid any risk and have more profit should rationally be lawful and accepted. Reysuni (1997) follows Al-sha³bi to the effect that, while some loss might result from an act at a particular time that may not be a reason for the occurrence of loss at another time. Al-sha³bi (2001) also maintains that according to the expression of the Islamic ruler, it is understood that the interests and benefits of the people are based on the individuals, situations, time and era.

On this point, two important and relevant legal concepts should be considered; concepts of sanctity of contract, known in Islamic law as *Asl al-ᶜaqd; Muqtadha al-ᶜaqd* (ᶜAbd Al-Razzaq Al-Sanhouri, 1953-1954) and freedom of contracts known as *hurriyat al-ᶜuqud* (ᶜAbd Al-Razzaq Al-Sanhouri, 1953-1954).The main concern of the concept of sanctity of contract is the necessity of performance of the obligations by the parties of a contract. In other words, it is about parties of the contract keeping their promises. As Abd Al-Razzaq Al-Sanhouri(1953-1954) explains, there are some Quranic verses and *ḥadith* (**لا امان لمن لا امانته له و لا دين لمن لا عهد له**) as to the necessity of performance of the obligations by the parties. The Quranic verses are "Oh believers! Fulfill [all] contracts" (Al-Quran, Maidah 5:1); "And fulfill [every] commitment; Indeed, the commitment is ever [that about which one will be] questioned" (Al-Quran Isrā 17:34); and "fulfill the covenant of Allah, when you make a covenant and do not break your oaths after they have been confirmed (by swearing in his name) for you make Allah your surety. Allah has knowledge of what you do" (Al-Qurn, Na%l 16:91). Moreover, based onIslamic law, sanctity of contract transfers the principle that people's property should be preserved and is inviolable. It forbids any act that leads to financial loss and damages to a person's wealth. As aformentioned, these prohibitionswhich are consequential to *Maqaṣid al Sharĭah*, were added to the main prohibitino of *gharar* to provide fairness and welfare to all parties (Rahail, 2008). As for the theory of freedom of contracts, ᶜAbd El-Wahab Ahmed El-Hassan (1985-1986) remarks that this theory was not considered by early Muslim jurists. He mentions that they have a narrow view of this concept. Such an attitude is originally rooted by the idea that based on Islamic rules, there are either permitted and legal (*ḥallal*) acts that are valid or forbidden and illegal (*ḥaram*)

and each of these categories are clearly explained and specified in Islam. Thus, as Islam has specified defined contracts then, any contract that falls out of this scope is illegal. As a result, the parties are not allowed to form any other kind of contracts. However, he points out that the Ḥanbalī jurists constituted an exception as they recognized the theory of freedom of contract based on the doctrine of *ʿibaḥah* (non-restriction). In line with this, Rayner (1991) explains an idea that has increasingly obtain more force in modern era; the only requirement inthe Quran for establishment of a valid and legal contract is the mutual consent of contracting parties. In Quran, it is read: "Believers, do not consume your wealth among yourselves in falsehood, but only through trading by your mutual agreement …" (Al-Quran, Nisā 4:9). Ḥamid Muḥammed (1969) points out that there are also other reported sentences of the Prophet (PBUH) which states: "It is not lawful to take the property of a Muslim except by his consent." The next *ḥadith* supports the above rules by imposing that: "Sale is by consent."

In his book of *Fatāwā*, Sheikh al-Islam Ibn Taymiyyah(1908) states that:

> If proper fulfillment of obligations and due respect for covenants are prescribed by the Lawgiver, it follows that the general rule is that contracts are valid. It would have been meaningless to give effect to contracts and recognize the legality of their objectives, unless these conditionswere themselves valid.

As Rayner (1991) explains, there is now "a reasonable presumption that all contracts are valid subject to their being expressly forbidden by the rule of law, or that they contain voidable stipulations, or contravene Islamic prohibitions such as *ribā* and *qarar* or public policy or morals." As an outcome of the discussions in a congress on Islamic law (Congress of the Week of Islamic Law, Damascus, 1961) the concept of freedom of contract was recognized and it was stated that any contract that considers the basic principles of Shariᶜah law of contract and the generally acknowledged principles of Islam is valid. Many Arab states have accepted the freedom of the parties to enter into a contract that has respected the above principles. This can be seen in the Civil Codes of Egypt (Egyptian Civil Code, No. 131 of 1948, Articles 131 and 65), Kuwait (Kuwaiti Civil Code, Law No. 67 of 1980, Article 168; Kuwaiti Commercial Code, Decree Law No. 68 of 1980, Articles 130, 121, 124 and 125), Dubai and Sharjah (Dubai Law of Contract, 1971, Articles 36, 37) and some other countries. In fact, as Rayner (1991) states, "...recent assimilation of civil law contracts into modern Islamic codes is evident enough that this is the common point of view throughout the Muslim world today". In addition, based on the Iranian law, the concept of freedom of contract is accepted and it is expressly mentioned in the Iranian Civil Code (Article 10). The concepts of sanctity of contract and freedom of contract, as ᶜAbd Al-Razzaq Al-Sanhourī mentions, are supported by the *ʿadith* that stresses that "... believers are bound by their stipulations" (**المؤمنون عند شروطهم**) that emphasizes on the importance of performance of the obligations that the parties are obliged to see through their contract.

Another issue to be considered here is the concept of *Ijtihad*. *Ijtihad*, means to derive laws from the fundamental and basic principles of the Shariœ"ah in order to answer the needs of people in different times and places. Ahmed illustrates this by stating that:

> …for example, while the Prophet (PBUH) refused price control (*tasir*) during his lifetime, some jurists belonging to Maliki and Hanafi Schools and Ibn Taimiyah allowed it under special circumstances. Similarly, the leading imams of *fiqh*, Abu Hanifah, Malik and Shafi changed their rulings (*fatwas*) depending on the customs prevailing in different social settings. For example, Imam al Shafi changed some of his earlier rulings after he moved from Baghdad to Egypt after observing the different customs in the latter place.

Since commercial activities fall under *muʿamalat*, the underlying principle relating to commercial laws is that of permissibility. As Kamaliexplains, the transactions that are mentioned in the Quran and Sunnah do not include all kinds of transactions and are not exhaustive. Thus, new transactions and contracting methods can be introduced as long as they are not opposed to the principles of theShariœ"ah. In fact, *fiqh* has a human element and can change over time and place (Mallat, 1993; Vogel *et al*, 1998). There are some examples in which the *fiqhi* rulings relating to contracts that were traditionally used in economic transactions are compared to the contemporary ones in order to demonstrate the adaptability of Islamic rules in transactions. Some of the traditional Islamic nominated contracts relating to economic transactions (such as *Muḍarabah*, *Musarikah*, *Ijarah, Juʿalah*) that can be used for financing, were required to take place directly between the parties involved. However, in the contemporary financial system, financing takes place either via the markets or intermediaries. As Habib Ahmed (2006) claims, "the traditional nominated contracts in their pure forms do not have the features that can cater to the needs of contemporary financial markets and institutions. Thus, the challenge for Islamic law was to adapt to this new financial structure to enable financing via markets and intermediaries." The practical problems of Islamic commercial law can evolve within the boundaries set by theShariœ"ah.

According to Masʿud (1995), there are two ways in which Islamic law can be developed and modified in response to global changes. One way is to use analogy and *ijtihad*. The second way is to "open the law itself to transform according to changed conditions." The first solution, *ijtihad*, is widely practiced and there is no problems. As to the concept of *ijtihad,*MaulanaWaheeduddin Khan states that:

> Ijtihad is the most important need of the Muslims. By applying the principles of Islam in changed conditions, they have to update procedures to prove that Islam is relevant to every age. For this, continuous thinking is necessary. Ijtihad does not mean free thinking. Ijtihad requires treating the Quran and Sunnah as the original sources and instead of following the opinion of earlier jurists who took those decisions in totally different conditions, try to follow the original sources and deduct new procedures according to the changed times.

In respect to another alternative, Siddiqi (2004) believes that it has to address contemporary issues that do not have any place in traditional rules. Under this approach, in light of the awareness of the significance of new rules in contemporary times and amid changes in global trade and commerce, some of the *fiqhi* rules will be modified.

Finally, it should be mentioned that any religion and specifically Islam aims to help human beings to live healthier and happier through rational and lawful paths. If Islamic rules aim to prevent people from any loss in their sale contracts and if based on contemporary needs and circumstances, it will be harmful for people if they are not allowed to form open price sale contracts. Thus, based on such aim this concept should be accepted and be lawful (at least as far as the issue of price in sale contract is concerned). The fact is that people will not have to form such contracts. They will have the option to make it if they think it is beneficial for them in certain circumstances. As such, people can feel safe and supported if they make their sale contracts with any provisions.

5. CONCLUSION

Justification for acceptance of open price term in sale contracts based on the Islamic principles shows that not only is the acceptance of open price term in line with Islamic principles, but also in order to practice

these principles more effectively, it is vital to accept this concept. This is to ensure that these Islamic principles are executed in a way that they preserve the interest of contracting parties and prevent any loss and contractual risk. In this study, an attempt has been made to illustrate that traditionally open price sale contracts are prohibited based on the theories of certainty and prohibition of loss. However, today this concept is vital to be accepted by Islamic rules, not only through the same theories of prohibition of a harmful sale contract and prohibition of loss and any causes of loss, but also based on the Islamic Doctrine of *Maslahah* and the theory of arurah.

ACKNOWLEDGEMENT

This study is part of the findings of the GUP Project Code: GUP-2016-030 and the FRGS Project Code: FRGS/2/2014/SSI10/UKM/02/1.

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